Supreme Court, U.S.
FILED
AUG 10 2016
OFFICE OF THE CLERK

No. 14-9496

IN THE

Supreme Court of the United States

ELIJAH MANUEL,

Petitioner,

v.

CITY OF JOLIET, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE NATIONAL DISTRICT ATTORNEY'S ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. THE FIRST APPEARANCE AND ITS PLACE IN THE PRETRIAL PROCESS 3

II. AFTER THE FIRST APPEARANCE, THE DEFENDANT IS HELD BECAUSE OF HIS ONGOING PROSECUTION, NOT BECAUSE OF HIS INITIAL ARREST 14

CONCLUSION 18

TABLE OF AUTHORITIES

Page(s)

CASES

Albright v. Oliver,
510 U.S. 266 (1994) 18

Corley v. United States,
556 U.S. 303 (2009) 4

County of Riverside v. McLaughlin,
500 U.S. 44 (1991) 5

Gerstein v. Pugh,
420 U.S. 103 (1975) ..... *passim*

Jenkins v. Chief Justice of Dist. Ct. Dep't,
619 N.E.2d 324 (Mass. 1993) 4

Kaley v. United States,
134 S. Ct. 1090 (2014) 13

Kirby v. Illinois,
406 U.S. 682 (1972) 9

Llovet v. City of Chicago,
761 F.3d 759 (7th Cir. 2014) 18

Michigan v. Jackson,
475 U.S. 625 (1986) 15

TABLE OF AUTHORITIES
(Continued)

Page(s)

Rothgery v. Gillespie County,
554 U.S. 191 (2008) ..... *passim*

Sheriff of Humboldt Cty. v. Lang,
763 P.2d 56 (Nev. 1988) 16

Thies v. State,
189 N.W. 539 (Wis. 1922) 12

Trap Rock Indus., Inc. v. Kohl,
284 A.2d 161 (N.J. 1971) 13

Virginia v. Paul,
148 U.S. 107 (1893) 15

STATUTES & CONSTITUTIONAL PROVISIONS

Cal. Const. art. I, § 14 8

Cal. Penal Code § 939.8 13

Colo. Rev. Stat. Ann. § 16-5-204(3)(e) 12

Nev. Rev. Stat. Ann. § 172.155 12

U.S. Const., amend. IV 2, 3, 5, 18

OTHER AUTHORITIES

Alaska R. Crim. P 5(c) 4

TABLE OF AUTHORITIES
(Continued)

Page(s)

Ariz. R. Crim. P 4.1(b) 7

Ariz. R. Crim. P 4.2(a)(2) 8

Fed. R. Crim. P 5 ..... 3, 4, 7

Fed. R. Crim. P. 5.1(a)(2) 11

Me. R. Unified Crim. P. 5 ..... 6, 8

Md. R. 4-213(a)(3) 9

Md. R. 4-216 10

Mich. Ct. R. 6.006(A) 7

Mich. Ct. R. 6.104 4

Miss. Unif. R. Cir. & Cty. Ct. Prac. 6.03 6

N.D. R. Crim. P. 5(b)(1) 9

N.H. R. Crim. P 4(e) 6

Pa. R. Crim. P 540 4

Utah R. Crim. P 7(c) 7, 10

W Va. R. Crim. P 5(a) 7

Wayne R. LaFave, *et al.*, *Criminal Procedure* (4th ed. 2015) ..... *passim*

TABLE OF AUTHORITIES
(Continued)

Page(s)

Wyo. R. Crim. P. 5(a) 6

Yale Kamisar, *et al.*, *Modern Criminal Procedure* (13th ed. 2012) 5, 7

STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The National District Attorney's Association is the oldest and largest organization representing the Nation's prosecutors. Its aim is to assist prosecutors in their mission of safeguarding the public and ensuring that justice is done. Its approximately 7,000 members, including most of the Nation's local prosecutors, assistant prosecutors, investigators, victim advocates, and paralegals, are responsible for enforcing the criminal laws of every State and territory. The mission of the Association is to be the voice of America's prosecutors and to support their efforts to protect the rights and safety of the People. Although NDAA's members have a duty to represent the government zealously, they are also joint partners with the courts in the pursuit of justice. Their practical experience provides important insight in assessing how best to achieve that shared goal, and their perspective should be particularly valuable in this case.

This case raises a concerning issue for prosecutors and law enforcement professionals nationwide. The issue before the Court concerns the proper means by

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[1] Counsel for all parties have consented to the filing of this brief, and those consents are on file with the Clerk of the Court. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than *Amicus* and its counsel, has made a monetary contribution to the preparation or submission of this brief.

which a criminal defendant may challenge aspects of his criminal prosecution. Allowing Fourth Amendment challenges to pretrial detention that occurred after the defendant's first appearance to proceed under the Fourth Amendment would open the door to new challenges by criminal defendants to grand jury proceedings, preliminary hearings, and even trials if they merely claim that these proceedings resulted in a lengthy detention without probable cause.

Amicus has expertise in the criminal process from arrest through prosecution and believes that this brief will assist the Court in its consideration of this matter.

SUMMARY OF THE ARGUMENT

I. Though the details vary from jurisdiction to jurisdiction and from case to case, many criminal prosecutions follow a fairly similar path. First, police officers arrest a suspect without a warrant and take him to the station house for booking. Within a day or two, the suspect is brought before a magistrate for his first appearance. At that hearing, the magistrate determines whether there is probable cause to support his arrest and detention, notifies the now-defendant of the charges against him, and decides whether or not to let him out on bail.

After the first appearance, every State uses at least one of two additional procedures designed to check the State's decision to prosecute: some hold preliminary hearings to determine whether the defendant should be taken to trial, while others

conduct grand jury proceedings toward the same end. Unless the defendant prevails in one of those proceedings, he must convince the prosecution to drop its case, plead guilty, or face trial.

II. As the steps laid out above illustrate, after the defendant's first appearance, his continued detention stems from the pending charges against him, not from his initial warrantless arrest. At the first appearance, the State formally commits itself to prosecute him absent some change in circumstance. And after that first appearance, the defendant may not seek to revisit the initial probable-cause determination, but must instead prevail at a preliminary hearing or avoid indictment by the grand jury to secure his release. Because the first appearance marks the line between police-led efforts to detain suspected criminals and prosecution-led efforts to convict them, any challenge to detention after that point cannot be governed by the Fourth Amendment and must instead fall within the Due Process Clause.

ARGUMENT

I. THE FIRST APPEARANCE AND ITS PLACE IN THE PRETRIAL PROCESS

Every U.S. jurisdiction guarantees every person who is arrested a first appearance before a judicial officer at some point shortly after arrest. *See* Fed. R. Crim. P 5 (federal requirements); 2 Wayne R. LaFave, *et al.*, *Criminal Procedure* § 6.3(c) (4th ed. 2015) (noting that the right to a "prompt appearance" is "a common if not universal

requirement under state law"). The terminology for this beginning judicial procedure differs widely; federal practice, for instance, refers to it as an "initial appearance," Fed. R. Crim. P. 5, or as "presentment," *Corley v. United States*, 556 U.S. 303 (2009), while state nomenclature shows even more color.[2] The timelines for these hearings also differ somewhat as well; many States set a fixed limit (generally between twenty and twenty-four hours from arrest, but sometimes up to forty-eight hours), while others use a standard rather than a rule (such as requiring that defendants be brought before a magistrate without "unreasonable" or "unnecessary" delay). *See Jenkins v. Chief Justice of Dist. Ct. Dep't*, 619 N.E.2d 324, 333–34 (Mass. 1993) (cataloguing the variations).

Despite these minor differences, first appearances across jurisdictions perform several of the same basic functions. *First*, the first appearance often serves as the first time at which a disinterested entity finds probable cause to support the defendant's initial arrest and detention. Of course, where the defendant was arrested pursuant to a warrant, someone other than the police has generally determined that probable cause justified

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[2] *See, e.g.*, Alaska R. Crim. P. 5(c) ("[f]irst [a]ppearance"); Mich. Ct. R. 6.104 ("arraignment on the warrant or complaint"); Pa. R. Crim. P 540 ("preliminary arraignment"); *Rothgery v. Gillespie County*, 554 U.S. 191, 195 (2008) (noting that Texas simply calls them "Article 15.17 hearings" in reference to their statutory home).

the arrest: either a magistrate approved an arrest warrant after making such a determination, *see* U.S. Const. amend. IV, or the arrest warrant stemmed from a grand jury indictment, which "conclusively determines the existence of probable cause and requires issuance of an arrest warrant without further inquiry," *Gerstein v. Pugh*, 420 U.S. 103, 117 n.19 (1975).

"The vast majority of arrests for felonies," however, "are made without first seeking a warrant." Yale Kamisar, *et al.*, *Modern Criminal Procedure* 10 (13th ed. 2012). In *Gerstein*, this Court held that though "a policeman's on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime[] and for a brief period of detention to take the administrative steps incident to arrest," 420 U.S. at 113–14, the Fourth Amendment requires "a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty," one that "must be made by a judicial officer either before or promptly after arrest," *id.* at 125; *see also County of Riverside v. McLaughlin*, 500 U.S. 44, 56–57 (1991) (the *Gerstein* determination must generally be made within 48 hours of the defendant's arrest).

Gerstein also held, however, that this judicial determination need not be made with the "full panoply of adversary safeguards—counsel, confrontation, cross-examination, and compulsory process"—often used in later pretrial proceedings to determine whether the defendant should face trial. 420 U.S. at 119; *see id.* at 119–20. Instead, because

the "sole issue is whether there is probable cause for detaining the arrested person pending further proceedings," the determination may be made just like the one to issue a warrant before an arrest: "by a magistrate in a nonadversary proceeding on hearsay and written testimony." *Id.* at 120.

As indicated above and in keeping with *Gerstein*'s own suggestion, *see id.* at 123, many States use the defendant's first appearance as the chance to make any required probable-cause determination.[3] Also in keeping with *Gerstein*'s emphasis on the need for flexibility, most jurisdictions tend to keep the entire first appearance, including the probable-cause

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[3] *See, e.g.*, Me. R. Unified Crim. P. 5(a)(2) ("Defendants arrested without a warrant shall be taken before the court. The complaint or information shall be filed in the Unified Criminal Docket forthwith. A determination of probable cause shall be made in accordance with Rule 4A unless an indictment has been returned."); Miss. Unif. R. Cir. & Cty. Ct. Prac. 6.03 ("If the arrest has been made without a warrant, the judicial officer shall determine [at the first appearance] whether there was probable cause for the arrest and note the probable cause determination for the record."); N.H. R. Crim. P. 4(e) ("*Gerstein Determination.* If the defendant was arrested without a warrant and is held in custody, or if the defendant was arrested pursuant to a warrant that was not issued by a judge and is held in custody, the court shall require the state to demonstrate probable cause for arrest."); Wyo. R. Crim. P. 5(a) ("When a person arrested without a warrant is brought before a judicial officer an information or citation shall be filed at or before the initial appearance and, unless a judicial officer has previously found probable cause for the arrest, probable cause shall be established by affidavit or sworn testimony.").

determination, "quite brief," 1 LaFave, *supra*, § 1.4(g), and rather informal. Michigan, for example, allows the use of "two-way interactive video technology to conduct" the first appearance, Mich. Ct. R. 6.006(A), and Utah allows "verbally" or "electronically" communicated probable-cause statements, so long as they are "reduced to a sworn written statement prior to submitting the probable cause issue to the magistrate for decision," Utah R. Crim. P. 7(c)(2)(A).

Second, the first appearance also serves as the time at which the State informs the defendant of the basics surrounding his impending criminal prosecution. Because the first appearance generally follows, is simultaneous with, or immediately precedes the filing of a criminal complaint specifying the particular charges for which the State intends to prosecute the defendant,[4] the magistrate uses the

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[4] *See, e.g.*, Ariz. R. Crim. P. 4.1(b) (anyone arrested without a warrant must be taken "before the nearest or most accessible magistrate" and "a complaint, if one has not already been filed," must be filed within 48 hours of the first appearance or else the defendant "shall be released from jail[] and the preliminary hearing date, if any, shall be vacated"); Fed. R. Crim. P. 5(b) (providing in connection with first appearances that "[i]f a defendant is arrested without a warrant, a complaint meeting Rule 4(a)'s requirement of probable cause must be promptly filed in the district where the offense was allegedly committed"); W. Va. R. Crim. P. 5(a) ("An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before a magistrate within the county where the arrest is made. If a person arrested

first appearance to inform the defendant of the substance of those charges.[5] The magistrate also generally informs the defendant about the next steps in the criminal process and about some of his legal rights during that process. Though "[t]he range of rights and proceedings mentioned will vary from one jurisdiction to another," "[c]ommonly[] the magistrate will inform the defendant of his right to remain silent," and the magistrate will "always" tell the defendant about "at least the very next proceeding in the process, which usually will be a preliminary hearing." Kamisar, *supra*, at 14. If the defendant lacks counsel at the first appearance, the magistrate will also inform him of his right to counsel, including the right to appointed counsel if he is indigent. *Id.*[6]

(continued...)

without a warrant is brought before a magistrate, a complaint shall be filed forthwith which shall comply with the requirements of Rule 4(a) with respect to the showing of probable cause.")

[5] *See, e.g.*, Ariz. R. Crim. P 4.2(a)(2) (the magistrate must "[i]nform the defendant of the charges" at the first appearance); Me. R. Unified Crim. P. 5(b)(1) (the defendant must be informed of "the substance of the charges against [him]").

[6] *See, e.g.* Cal. Const. art. I, § 14 ("A person charged with a felony by complaint subscribed under penalty of perjury and on file in a court in the county where the felony is triable shall be taken without unnecessary delay before a magistrate of that court. The magistrate shall immediately give the defendant a copy of the complaint, inform the defendant of the defendant's right to counsel, allow the defendant a reasonable time to send

These disclosures highlight perhaps the most salient feature of the first appearance: it marks "the starting point of our whole system of adversary criminal justice," the first time at which "the government has committed itself to prosecute, ... the adverse positions of government and defendant have solidified ... [,] and [the] defendant finds himself faced with the prosecutorial forces of organized society[] and immersed in the intricacies of substantive and procedural criminal law." *Kirby v. Illinois*, 406 U.S. 682, 689 (1972). As the Court put it in *Rothgery*, once the first appearance has started the formal wheels of criminal justice in motion, the State has committed to the prosecution and the defendant must respond accordingly. Of course, "[t]he State may rethink its commitment at any point: it may choose not to seek indictment in a felony case, say, or the prosecutor may enter *nolle prosequi* after the case gets to the jury room." *Rothgery*, 554 U.S. at 210. "But without a change of position, a defendant subject to accusation after

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for counsel, and on the defendant's request read the complaint to the defendant."); Md. R. 4-213(a)(3) ("The judicial officer shall require the defendant to read the notice" listing his rights or "shall read the notice to a defendant who is unable for any reason to do so."); N.D. R. Crim. P 5(b)(1) ("The magistrate must inform the defendant" of his right "to have legal services provided at public expense to the extent that [he] is unable to pay for the defendant's own defense without undue hardship," provided that "the offense charged is one for which counsel is required.").

initial appearance is headed for trial and needs to get a lawyer working, whether to attempt to avoid that trial or to be ready with a defense when the trial date arrives." *Id.*

Third, many jurisdictions use the first appearance as the first opportunity at which to determine whether to release the defendant on bail or other forms of conditional release. Though the details vary considerably, in the "[t]ypical" case, an arrested defendant is "taken to the nearest station house and then transported to the city jail within 24 hours." 4 LaFave, *supra*, § 12.1(b). Although some jurisdictions offer defendants charged with less serious crimes the chance to secure release at the station house, for many defendants charged with more serious offenses the first appearance offers the first chance to post bail. *See id.* Once again, the details of this aspect of the first appearance differ widely. Utah, for example, generally uses a "Uniform Fine / Bail Schedule" that assigns bail amounts based on the severity of the charges. *See* Utah R. Crim. P 7(c)(3)(B). Maryland, by contrast, instructs the judicial officer to consider a whole host of factors, including "the nature and circumstances of the offense charged," "the nature of the evidence against the defendant," "the potential sentence upon conviction," flight risk, family ties, possible dangerousness, and information provided by the defendant or his counsel. Md. R. 4-216(e)(1)(A); *see also id.* R. 4-216(a) (instructing magistrates to consider bail only after determining probable cause in the case of warrantless arrests). If the defendant

cannot make (or is not offered) bail at his first appearance, he is remitted, not back to police custody, but to the county jail or its local equivalent.

After the defendant's first appearance, every jurisdiction provides at least one of two major pretrial procedures to further screen the State's decision to prosecute: a preliminary hearing or grand jury review. Practically every jurisdiction statutorily affords felony defendants a preliminary hearing (sometimes also called a "preliminary examination," a "probable cause" hearing, a "commitment hearing," an "examining trial," or a "bindover hearing") at some point "from a few days to a few weeks following" the defendant's first appearance. 4 LaFave, *supra*, §§ 14.1(a), 14.2(f).[7]

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[7] Though almost every state guarantees defendants a preliminary hearing in certain circumstances, the actual usage of those hearings varies widely. Each of the eighteen states in which all felony prosecutions must be preceded by a grand jury indictment also provides the defendant with the right to a preliminary hearing, though that hearing may be (and in some jurisdictions must be) bypassed if the grand jury returns an indictment prior to the hearing. *See* 4 LaFave, *supra*, § 14.2(c); *see also* Fed. R. Crim. P 5.1(a)(2) (no need for a preliminary hearing where "the defendant is indicted"). The vast majority of the remaining states, where felony prosecutions may be initiated either by information or by indictment, also grants defendants the right to a preliminary hearing. *See* 4 LaFave, *supra*, § 14.2(d). Again, though, actual practice varies considerably: some allow "direct filing" of an information without a preliminary hearing, many make a preliminary hearing a prerequisite to filing an information, some require a preliminary hearing even where an indictment is returned, and so on. *See id.*

These open, adversarial hearings require the prosecutor to prove to a judge that there is sufficient evidence to "bind the case over" for additional prosecution (either indictment by a grand jury or the filing of an information). In this way, these hearings "prevent hasty, malicious, improvident, and oppressive prosecutions, ... protect the person charged from open and public accusations of crime, ... avoid both for the defendant and the public the expense of a public trial, ... [and] save the defendant from the humiliation and anxiety involved in public prosecution." *Thies v. State*, 189 N.W. 539, 541 (Wis. 1922). Preliminary hearings also give courts an opportunity to revisit bail decisions made on the basis of the often limited information available at the first appearance. *See* 4 LaFave, *supra*, § 14.1(e).

Some States use the grand jury in lieu of (or in addition to) the preliminary hearing as a means by which to review the State's decision to prosecute those arrested without a warrant. Though the prosecutor largely directs grand jury proceedings in such circumstances, the grand jury retains its historic screening function because it must independently decide whether the State has proffered enough evidence to put the defendant on trial. The standard that the prosecution must meet to justify a prosecution differs across jurisdictions,[8]

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[8] Some States ask whether there is probable cause to believe that the accused committed the crimes charged. *See, e.g.*, Colo. Rev. Stat. Ann. § 16-5-204(3)(e); Nev. Rev. Stat. Ann. § 172.155. Other States, however, use the "prima facie

but the consequences of the grand jury's decision are largely the same. If it finds that there is sufficient evidence to move forward, that finding—generally made "without any review, oversight, or second-guessing," *Kaley v. United States*, 134 S. Ct. 1090, 1098 (2014)—authorizes the defendant's continued detention and subsequent prosecution. If, however, the grand jury exercises its "complete independence in refusing to indict," 4 LaFave, *supra*, § 15.2(g), the prosecution may not proceed without additional steps, such as resubmission of the case to a second grand jury, *see id.* § 15.2(h).

After the defendant's first appearance, the wheels are thus set in motion for his ultimate prosecution. If he can convince the prosecution to drop its case, win at the preliminary hearing, or avoid indictment by the grand jury, he will not face prosecution. Otherwise, he must plead guilty or stand trial.

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evidence" standard, which authorizes an indictment only "when all the evidence taken together, if unexplained or uncontradicted, would warrant a conviction of the defendant." 4 LaFave, *supra*, § 15.2(f); *see also, e.g.*, Cal. Penal Code § 939.8; *Trap Rock Indus., Inc. v. Kohl*, 284 A.2d 161 (N.J. 1971).

II. AFTER THE FIRST APPEARANCE, THE DEFENDANT IS HELD BECAUSE OF HIS ONGOING PROSECUTION, NOT BECAUSE OF HIS INITIAL ARREST

The prosecutorial pathway laid out above is quite commonplace—it is essentially identical to the one that *Rothgery* traveled, *see* 554 U.S. at 195–96 (warrantless arrest, then first appearance with probable-cause determination, notification of charges, and release on bail, then indictment, then prosecutor's motion to dismiss), and it closely tracks the one followed here, *see* Resp. Br. 10–12 (warrantless arrest, then criminal complaint, then first appearance with *Gerstein* determination, notification of charges, and bail proceedings, then transfer to county jail, then indictment, then arraignment, then *nolle prosequi*). As this pathway demonstrates, the first appearance marks a crucial turning point in the defendant's detention. From that point forward, the defendant is not being held because of his original arrest and its accompanying finding of probable cause. Rather, he is detained because of an ongoing, prosecution-driven effort to convict him of the formal charges that he now faces.

Each aspect of the typical prosecution discussed above proves as much. Consider, for instance, the notification of formal charges that takes place at the defendant's first appearance. As this Court has repeatedly emphasized, these formal charges (and the disclosures that accompany them) inform the defendant that the relationship between him and the State has become "solidly adversarial." *Rothgery*,

554 U.S. at 202; *see also, e.g.*, *Michigan v. Jackson*, 475 U.S. 625, 629 n.3 (1986) (noting that the first appearance "signals the initiation of adversary judicial proceedings"), *overruled in part on other grounds by Montejo v. Louisiana*, 556 U.S. 778 (2009). And as this Court also emphasized in *Rothgery*, once the defendant has been notified of the formal charges against him at his first appearance, the case is destined for prosecution: unless there is a "change of position" from the prosecution (not the police), the defendant is "headed for trial and needs to get a lawyer working," either to avoid that trial or be ready when it comes. 554 U.S. at 210.

The bail-related portion of the initial appearance also reflects the extent to which, after that point, the defendant is held as part of an ongoing prosecution rather than due to his original arrest. Bail is expressly designed with future proceedings in mind: the magistrate, who herself may have "no jurisdiction" to make the defendant "answer for a crime or offense," assigns bail "to secure [the defendant's] appearance ... before the court in which he may be prosecuted." *Virginia v. Paul*, 148 U.S. 107, 119 (1893); *see also* 4 LaFave, *supra*, § 12.1(b) ("The typical state statute declares that the objective of bail is to secure the defendant's attendance at the proceedings against him and to prevent his punishment before conviction."). Indeed, the defendant's physical location after the first appearance itself demonstrates that he is being held because of his pending prosecution rather than his initial arrest; if he does not make (or is not offered)

bail, rather than sit in the stationhouse lockup, he will be detained in the county jail or analogous facility with everyone else awaiting trial.

The probable-cause determination that often accompanies the defendant's first appearance does not change this conclusion. To be sure, where the *Gerstein* determination precedes the first appearance, it may make sense to say that the defendant is detained pursuant to that probable-cause determination. But once the State has initiated formal criminal process during that first appearance, the initial probable-cause determination soon falls out of the picture. The defendant may not challenge or revisit it, but instead is given other fora in which to contest his ongoing detention: he can win before the judge at the preliminary hearing or before the grand jury during those proceedings, successfully move to quash or dismiss any indictment or information, or prevail upon the prosecutor to drop the case.[9]

Those remaining steps of the pretrial process underscore the difference between detention due to the defendant's initial arrest and detention due to his subsequent prosecution. Neither the preliminary

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[9] In some jurisdictions, defendants may seek habeas corpus relief from an adverse finding at a preliminary hearing before the filing of an information or indictment. *See Sheriff of Humboldt Cty. v. Lang*, 763 P.2d 56 (Nev. 1988). Because motions to quash or dismiss informations or indictments are now widely available, relief via habeas corpus is generally not. *See* 4 LaFave, *supra*, § 14.3(d) n.95 (collecting cases).

hearing nor the grand jury's review focuses on the backward-looking questions of whether the defendant was lawfully arrested or lawfully held immediately after his arrest. Instead, each asks whether there is sufficient reason to believe that the defendant committed the crime of which he now stands formally accused. *See supra* 11–13 & n.8.

Though that standard sounds similar to the one used to secure an arrest warrant or make a post-arrest *Gerstein* determination, the advance in procedural posture matters. Unlike the informal, ex parte procedures used to secure a warrant or make a *Gerstein* determination, preliminary hearings are fully adversarial, generally allowing the defendant to cross-examine the prosecution's witnesses and to put on his own. As a result, the magistrate's conclusion at the preliminary hearing does not "merely duplicate the earlier decision made in the same case ... in the issuance of an arrest warrant or in the ex parte post-arrest [*Gerstein*]" determination. 4 LaFave, *supra*, § 14.3(a).

So too for the grand jury. Though the prosecutor often controls the presentation of evidence there, the grand jury generally retains the power to compel additional evidence, and in more than a dozen States it must compel that evidence if it has reason to believe that the evidence will disprove the charge. *See id.* § 15.2(b). Moreover, even though grand jury proceedings are not adversarial, most prosecutors will allow the defendant to testify (if he so chooses), and some States specifically provide that defendants may testify upon request. *See id.* § 15.2(c). Thus,

even though prosecutors play a key role in shaping many grand jury proceedings, those proceedings do not simply rehash probable-cause determinations made earlier in the case. Both the preliminary hearing and the grand jury's review thus illustrate that the defendant's continued detention results from the pending proceedings against him, not his original arrest.

* * *

The defendant's initial appearance before a magistrate marks a turning point between his initial arrest and his ongoing confinement. From that point forward, it is the State's machinery of criminal justice—its decision to press formal charges, the finding of probable cause at the preliminary hearing, and the grand jury's return of a true bill—that is responsible for the defendant's condition, not the police officer's decision to arrest. At the point of the first appearance, then, the Fourth Amendment "falls out of the picture," *Llovet v. City of Chicago*, 761 F.3d 759, 763 (7th Cir. 2014), leaving to the Due Process Clause the task of regulating the ongoing prosecution, *see Albright v. Oliver*, 510 U.S. 266, 282–86 (1994) (Kennedy, J., concurring). For that reason, Petitioner's attempt to extend the Fourth Amendment to cover all pretrial detention must fail.

CONCLUSION

The judgment of the Seventh Circuit should be affirmed.

Respectfully submitted,

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August 2016